

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LARRY H. & REGINA A. McDONALD,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CA 3:02-CV-1510-R

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant United States' ("Defendant") Motion for Summary Judgment. On July 17, 2002, *pro se* Plaintiffs Larry H. and Regina A. McDonald ("Plaintiffs") filed this suit against the United States concerning an assessment of frivolous tax return penalties against Plaintiffs, the validity of certain sections of the Internal Revenue Code and the procedures followed by the Internal Revenue Service ("IRS") in assessing Plaintiffs' tax liability and conducting a Collection Due Process hearing. Plaintiffs request a declaratory judgment, costs, and punitive damages. For the reasons stated below, Defendant's Motion for Summary Judgment is **GRANTED** as to all claims.

I. BACKGROUND

On March 23, 2000, Plaintiffs filed their Form 1040, 1997 federal income tax return, and 1998 federal income tax return with zeros on every line, save the tax withheld and a request for refund. On June 26, 2000, the IRS assessed a separate \$500 civil penalty against Plaintiffs for frivolous tax returns. Plaintiffs received a notice of intention to collect outstanding civil penalties from the IRS on September 21, 2000. On October 17, 2000, Plaintiffs requested a Collection Due Process ("CDP") hearing under 26 U.S.C. § 6330(b). The hearing was held on May 15, 2002. Plaintiff Larry McDonald attended the hearing with his witness Mark Rose, and Plaintiffs' request to audio record the hearing was denied by the IRS Appeals Officer conducting the hearing. On June

18, 2002, the IRS issued a Notice of Determination explaining that no acceptable levy alternative was available for the collection of Plaintiffs' tax liabilities. Plaintiffs filed this action for review of an administrative determination made by the IRS. Plaintiffs ask the court to declare the determination by the IRS invalid and award Plaintiffs costs and punitive damages.

II. ANALYSIS

A. Summary Judgment Standard

In a collection due process action such as this, where the underlying tax liability is at issue, the court reviews the underlying liability *de novo*. *Jones v. Comm'r of Internal Revenue*, 338 F.3d 463, 466 (5th Cir. 2003), *reh'g denied*. Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment only when the moving party demonstrates that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Melton v. Teachers Ins. & Annuity Assoc. of Am.*, 114 F.3d 557, 559 (5th Cir. 1997). The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact. *See Celotex Corp.*, 477 U.S. at 323.

Once the movant has discharged its initial burden under Rule 56, the nonmovant must set forth specific facts, by affidavits or otherwise, that show a genuine issue for trial. *See Topalian v. Ehrman*, 954 F.2d 1125, 1132 (5th Cir. 1992), *cert. denied*, 506 U.S. 825 (1992). In weighing the evidence, the court must decide all reasonable doubts and inferences in the light most favorable to the nonmovant. *See Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988); *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985). As long as there appears to be some support for the disputed allegations such that "reasonable minds could differ as to the import of the evidence," the motion for summary judgment must be denied. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Summary judgment for the defendant will be granted if the plaintiff fails to make a showing sufficient to establish a material issue of fact

as to the existence of an element essential to its case. *See Celotex*, 477 U.S. at 322. Because this case was brought by *pro se* Plaintiffs, the allegations by the Plaintiffs are to be held to “less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

B. Plaintiffs’ Tax Liability and Frivolous Claim Penalties

Plaintiffs challenge the validity of income tax assessment and the levying and collection of frivolous tax claim penalties. First, Plaintiffs claim that no section of the Internal Revenue Code makes Plaintiffs liable for income taxes. Section 1 of the Internal Revenue Code, 26 U.S.C. § 1, imposes a duty to pay income taxes. “Income tax laws apply to income earned by individuals.” *Jones*, 338 F.3d at 466. Decades of precedent in this Circuit advises that the collection of income taxes is constitutional. *Stelly v. Comm’r of Internal Revenue*, 782 F.2d 1341, 1343 (5th Cir. 1985).

Plaintiffs’ claim that no section of the Internal Revenue Code imposes upon them liability for income taxes is baseless and without merit.

Next, Plaintiffs claim that Section 6702 is invalid because it lacks an implementing regulation. Section 6702 allows the imposition of a \$500 civil penalty for frivolous tax claims. Under 26 U.S.C. § 7805(a), the Secretary of the Treasury Department is granted broad discretion to “prescribe all needful rules and regulations for the enforcement of [the Internal Revenue Code],” except where Congress has expressly given such authority to another. Section 6702 of the Internal Revenue Code is a valid statute authorizing the IRS to assess and collect civil penalties for frivolous tax returns.

C. Plaintiffs’ Procedural Claims

First, Plaintiffs claim that Defendant’s assessment of civil frivolous-return penalties under 26 U.S.C. § 6702 for tax years 1997 and 1998 were not properly assessed. The IRS may impose a \$500 civil penalty under 26 U.S.C. § 6702 on individuals who file what purports to be a tax return and that return “(1) contains information on its face which indicates the taxpayer’s self-assessment is substantially incorrect, and (2) is based on a frivolous position.” *Anderson v. United States*, 754 F.2d 1270, 1271 (5th Cir. 1985), *reh’g denied*. In this case, Plaintiffs filed tax returns in 1997 and

1998 with zeros in every line except those for tax withheld and a request for refund. On its face, this self-assessment is incorrect. Plaintiffs' position that no federal statute imposes income tax liability is clearly frivolous. The \$500 civil penalty for filing a frivolous claim was properly assessed.

Next, Plaintiffs claim that they should have been allowed to audio record their CDP hearing. Plaintiffs requested and were granted a CDP hearing. Plaintiffs also requested that they be allowed to tape record the hearing. Plaintiffs were entitled to make such an audio recording under 26 U.S.C. 7521(a)(1). *Keene v. Comm'r of Internal Revenue*, 121 T.C. No. 2 (2003). However, failure by the Appeals Office to allow Plaintiffs to make an audio recording of the CDP hearing does not warrant remand. *Brashear v. Comm'r of Internal Revenue*, 2003 WL 21540439 (U.S. Tax Ct. 2003).

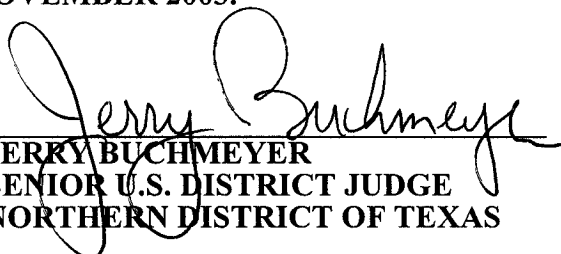
Last, Plaintiffs claim, pursuant to 26 U.S.C. § 6330(c)(2), that the Appeals Officer failed to obtain verification from the Secretary of Treasury that the IRS had complied with the requisite procedures. To satisfy the statutory obligation of verification, an Appeals Officer may review a Form 4340 and determine that the IRS has followed legal and administrative procedures. *Jones*, 338 F.3d at 466. In this case, the Appeals Officer reviewed IRS transcripts (Plaintiffs' Form 4340) to make a determination of legal and administrative compliance. Plaintiffs have presented no evidence that puts the procedures followed by the IRS at issue. Plaintiffs' CDP hearing is not defective on these grounds.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is **GRANTED** as to all claims.

IT IS SO ORDERED.

SIGNED THIS 25 DAY OF NOVEMBER 2003.


JERRY BUCHMEYER
SENIOR U.S. DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS